The Solicitors' Journal

VOL. LXXXII. **Saturday, September 17, 1938.** No. 38

Editorial, Publishing and Advertisement Offices: 29-31, Breams Buildings, London, E.C.4. Telephone: Holborn 1853.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £2 12s., *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 1d. *post free.*
CONTRIBUTIONS: Contributions are cordially invited, and must be accompanied by the name and address of the author (not necessarily for publication) and be addressed to The Editor at the above address.
ADVERTISEMENTS: Advertisements must be received not later than 1 p.m. Thursday, and be addressed to The Manager at the above address.

Current Topics.

Ambassadors.

THE announcement of the likelihood of a change in the immediate future in the representation of Japan at its embassy in London, offers an opportunity of considering once again the peculiar functions of an ambassador and the immunities he enjoys from the jurisdiction of the courts of the country to which he is accredited. As we know, ambassadors are of ancient origin, and the privileges they enjoy have grown up as the result of long experience. At one time there clung to diplomatists the reproach that their chief function was to throw dust in the eyes of the nation where they resided, a view which was crystallised IN the cynical saying attributed to Sir HENRY WOTTON that "an ambassador is an honest man sent to lie abroad for the good of the commonwealth." This doctrine, though it had its supporters, received no countenance from LORD MALMESBURY, who declared that "no occasion, no provocation . . . can need, much less justify, a falsehood," or from LORD CLARENDON, who said that "the special art required is this, to be perfectly honest, truthful, and straightforward." To lawyers the matter which is of chief interest in connection with ambassadors is that which relates to the immunities they enjoy from the jurisdiction of the local courts. These were secured to them by the law of nations, but it was long before they were admitted in England. In 1708, however, the arrest in London of the ambassador of Peter the Great for debt brought the matter to a head and led to the passing of the statute 7 Anne c. 12. This statute recited the fact of the arrest made "in contempt of the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable." It then went on to enact that "all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other public minister of any foreign prince or state authorised or received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister may be arrested or imprisoned or his or their goods or chattels may be distrained or seized or attached shall be deemed and adjudged to be utterly null and void to all intents and purposes whatsoever." The person of a diplomatic envoy is inviolable, nor may he be punished for any criminal offence by the courts. This immunity from prosecution, however, does not involve that he may conduct himself with impunity, for he is expected to conform to the law of the country to which he is accredited. If he fails to do so, he is liable to be recalled on representations to his Government by that country's Foreign Office. Happily occasions for recourse to this drastic step are of rare occurrence.

The Dutch and the Law.

ALTHOUGH in these days the Dutch civilians may not, as once they did, attract a multitude of young Scotsmen—BOSWELL was among the number—desirous of perfecting their acquaintance with Roman law, Holland still worthily maintains her traditional love of legal learning. In the sphere of public law, as we have been again reminded by the recent meeting at Amsterdam of the International Law Association, it can boast of such great names as GROTIUS and his successors, who sought to substitute for the horrors of war the still small voice of law and order; and, accordingly, it was fitting that the Association should hold its meeting in Holland, particularly so as this synchronised with the joyful celebration by QUEEN WILHELMINA of the fortieth year of her reign. During that long period Her Majesty has on many occasions visited our shores, and on one of these, it is interesting to recall, she graced our Law Courts with her presence, an incident duly noted in his book "Life in the Law" by the late JOHN GEORGE WITT, K.C. He mentions that while the case in which he was engaged was in the Court of Appeal a young lady, accompanied by two ladies of more mature years, came in and were given seats on the bench close to LORD ESHER, the then Master of the Rolls. The young lady was no less a personage than QUEEN WILHELMINA. WITT accordingly recorded with some pride the fact that he had argued a case before the Sovereign of a great country, but he added that

his vanity did not go so far as to suppose that Her Majesty was told who he was; but he thought it a singular coincidence that this royal lady should have listened to an address from a namesake of the Grand Pensionary who was the personal and political enemy of the House of Orange.

National Planning.

In the course of a paper read at the Town and Country Planning Summer School, which was recently held at Exeter, Mr. R. L. Moon, Clerk of the Gloucestershire County Council, deplored the neglect of national problems in planning legislation. It was, he urged, imperative that local authorities, to prepare useful practical schemes, should have some guidance on national planning proposals from some properly constituted body. Until a national survey, both from economic and physical standpoints, had been made and some machinery set up to co-ordinate activities, the skeleton on which local authorities must base their schemes was missing. Should any proposals materialise for dealing with planning on a national scale they would inevitably dislocate and throw out of balance all the schemes at present being prepared. Mr. Moon went on to apply these considerations to the subject of transport and communications. Roads, railways, canals, coastal shipping, and air communications must be viewed together, made to dovetail into one another, and all improved and re-designed to deal with the classes of traffic they could best digest. The problem of co-ordinated transport and communications, coupled with such problems as were presented to planning authorities by depressed areas, defence and the provision of public services, indicated clearly, the speaker argued, the urgency for some national body to make a survey of those aspects of planning which could only be properly conceived on a national basis. It is thought that many readers will subscribe to the proposition that clearer guidance than is at present available might with advantage be furnished to the local authorities in the form of a scheme on a national scale within which the local authorities could work. Under the Town and Country Planning Act, 1932, and its predecessors in this branch of legislation, the initiative has rested with the authorities themselves who are naturally not in a position to plan their areas with reference to wider needs, and, while the Ministry of Health exercises certain powers over the planning authorities, these are substantially of approving or rejecting schemes or giving decisions on individual points which arise for decision thereunder, and the Ministry is not in a position to initiate a scheme in relation to the entire country. Nor, indeed, is a mere shifting of the initiative advocated by Mr. Moon, who insisted that all planning legislation should be based on strictly democratic principles.

The "Halt" Sign.

A further crop of prosecutions at certain cross-roads in Somersetshire has led once again to the utility of the "Halt at Major Road Ahead" sign being questioned. Five years ago nine of the members of the Departmental Committee on Traffic Signs were signatories to a reservation to the effect that the sign would be prejudicial to other traffic signs in that it departed from the principle of informing a driver of the danger and leaving him to adjust his driving accordingly and as tending to belittle the effect of other warnings, and particularly that conveyed by the "Slow—Major Road Ahead" sign. The removal from the driver of his discretion and judgment was regarded as a retrograde step, and the insistence upon the unnecessary stopping of a vehicle was, it was argued, calculated to give rise to a tendency to disregard the order. The foregoing reservation was backed by a large volume of responsible opinion, which was not confined to organisations representing the interests of the motoring section of the community. Some few years after the introduction of these signs the Ministry of Transport insisted upon a review of the localities at which they had been erected with the result that the slow sign was substituted at a number of road intersections. It is now suggested that the strictures contained in the reservation have been justified by events and that the halt sign, instead of serving the useful purpose for which it was intended, is frequently regarded by motorists as an irritant and in a number of cases as an unwarranted injunction. We are not prepared fully to endorse this view. It may be readily admitted that the great majority of motorists drive with caution and consideration and that in their case the appropriate method of warning is an intimation of the nature of the danger rather than a definite instruction. But there is also a not inconsiderable minority whose discretion cannot be relied upon. The incompetence or thrusting propensities of this section are the root cause of many of the road fatalities and injuries. Appeals to the discretion of such as these are fruitless and a definite order is required. If there are sufficient road intersections of such a character that a prudent motorist on emerging from the minor road would stop, then the halt sign is justified. We think that most readers will endorse the proposition contained in the protasis. Whatever views may be entertained on this question, it is clear that the ignoring of the halt sign is fraught with particular danger to those using the protected road and one who chooses to disobey the injunction conveyed by this sign has only himself to thank if his unlawful act is visited with the ordinary consequences.

Illegal Traffic Signs: Ministry of Transport Circular.

It is of interest, in the light of the question discussed in the preceding paragraph, to note that the Minister of Transport has recently sent to highway authorities a circular on the subject of unauthorised traffic signs. Readers will remember that under s. 48 (1) of the Road Traffic Act, 1930, a highway authority may cause or permit traffic signs to be placed on or near any road in its area "subject to and in conformity with such general or other directions as may be given by the Minister." As amended by s. 40 of the Road Traffic Act, 1934, subs. (3) of the above cited section of the Act of 1930 reads, subject to a proviso not material to the present purpose: "After the commencement of this Act no traffic signs (other than traffic signs placed by a council or local authority in pursuance of an obligation imposed by or under this Act or the Road Traffic Act, 1934) shall be placed on or near any road except under and in accordance with the preceding provisions of this section." In the circular above referred to, the Minister points out that the use of unauthorised signs, besides being a contravention of the statute, tends also to decrease the effectiveness of the system of traffic signs as a whole. Evidence before him indicates a growing tendency on the part of certain highway authorities to erect, or permit others to erect, traffic signs which are not of the prescribed type or which have not been otherwise authorised. The Minister states that he is reluctant to believe that there is on the part of the authorities any general disregard of the law, and he requests that councils shall arrange for him to be supplied not later than 31st October with a statement showing (A) particulars of the number and type of any unauthorised signs which have been erected since January, 1934; and (B) what steps have been, or will be, taken for the removal of unauthorised signs and their replacement, if necessary, by signs which conform with s. 48 of the Road Traffic Act, 1930. It is recalled that in accordance with the authorisation issued by the Minister on 22nd December, 1933, the Royal Automobile Club, the Royal Scottish Automobile Club, the Automobile Association, and the Cyclists' Touring Club are permitted to supply certain signs for erection by or on behalf of highway authorities. Under subs. (2) of s. 48 the Minister may authorise the erection or retention of traffic signs not of the prescribed form, and the circular states that, if any authority considers that there are valid reasons for retaining any unauthorised signs at present erected in their area, formal application should now be made for their retention.

Criminal Law and Practice.

ONUS OF PROOF IN BIGAMY.

We have discussed in a previous article the question whether bigamy has been committed when the second form of marriage is not strictly legal (*ante*, p. 124, "Bigamy and Gretna Green Marriages"). The Court of Criminal Appeal recently considered a case in which it was alleged by the defendant that the first marriage was invalid (*R.* v. *Morrison*, 15th August, 1938).

It is obviously essential to prove a valid first marriage in order to bring home a charge of bigamy. It is also necessary to prove that it has not been dissolved by the death of one of the parties or by divorce. In the words of Parke, B., in *Catherwood* v. *Caslon* (1844), 13 M. & W. 261, there must be proved "an actual marriage, valid or avoidable, and not yet avoided."

The marriage must be proved by evidence of actual solemnisation of the ceremony in accordance with the requisite forms of law (*Catherwood* v. *Caslon*, *supra*). It is not necessary to prove the registration, or licence or banns, and it is sufficient if someone is called who was present at the ceremony (*Re Allison and Wilkinson* (1806), Russ. & Ry. 109). A mere admission by the prisoner, however, that he has committed bigamy is not sufficient evidence of a valid first marriage (*R.* v. *Flaherty* (1847), 2 Car. & Kir. 782).

The question that was raised in *R.* v. *Morrison*, *supra*, was as to the proper direction to be given to the jury where the first marriage is impeached by the defendant. The appellant went through a form of marriage with Mrs. H on 11th March, 1938, and a second form of marriage with Mrs. I on 16th March, 1938. Mrs. H gave evidence that she had married Mr. H in June, 1919, and she last saw him in Canada in 1928. There was no further evidence as to his continued existence after that date, but on 11th March, 1938, she told the registrar that she had not seen Mr. H since 1928, and he replied that it was all right and she could properly describe herself as a widow.

The appellant complained that the judge misdirected the jury by leaving them under the impression that it was for the defendant in the circumstances of the case to establish his defence. The learned judge, it was argued, should have said: "Unless you are satisfied that Mr. H was not dead, you should acquit the defendant Morrison, and you should convict only if you are satisfied that Mr. H was already dead."

What the judge did say was: "They say that, although the defendant in this case did go through a ceremony of marriage with Mrs. H on 11th March, and although he believed at the time that it was a lawful marriage, and although she believed at the time that it was a lawful marriage, it now turns out—and they say they are able to prove it—that it was not a marriage at all, because she was not free to marry, as she had a husband living . . . If you think it may have been no marriage at all, then the prosecution will not have proved that this man had two wives at the same time, but only one, Mrs. I, because the first woman was not his wife, if that is the view you take of the evidence." With regard to the defence he said: "Has it been made out? Do you believe it? that is the question. According to whether you find the story credible or incredible, it may be that your verdict will go." In a later part of the summing up he said: "If in spite of there being no merits in it, he has established the technical defence that, although he believed he was committing bigamy, it turns out that he was not, because the woman with whom he had previously gone through a ceremony of marriage had at the time a husband alive, then you will acquit him."

In giving the judgment of the court dismissing the appeal, Mr. Justice Branson said that one might suggest as a possible amendment that the judge might have repeated what he had already said, and added: "If you believe that the woman may have had a husband living." His lordship said, however, that it was unnecessary to repeat the statement to the jury in these references to the defence in a short summing up of this sort, where the judge has put the law very clearly and fully.

The question of the onus of proof in cases of this kind is one of vital importance. Mr. Justice Branson referred in his summing up to *R.* v. *Willshire*, 6 Q.B.D. 366, in which the Court of Crown Cases Reserved considered the case of a prisoner who had been convicted of bigamy in marrying B in 1868, his wife A, whom he married in 1864, being alive. In 1879 he married C, and during C's life, in 1880, he married D. He was then charged with bigamy in going through a form of marriage with D, C being then alive. At the trial the prisoner's counsel called a witness, who produced a certificate of the prisoner's previous conviction in 1868. The indictment for bigamy was also properly proved at the instance of the prisoner's counsel. The prisoner's counsel argued that in order to succeed, the prosecution must show that A, who he had proved was living in June, 1868, was dead on 7th September, 1879, when the prisoner married C. The prosecution argued that there was a presumption that A was dead after seven years, and a *prima facie* case having thus been made out, it was for the prisoner to disprove it by evidence. The learned judge held that the burden of proof was on the prisoner and the jury found the prisoner guilty.

The Court of Crown Cases Reserved pointed out that there were conflicting presumptions, one, of innocence in favour of the prisoner, and the second, in favour of the duration of life. Lopes, J., put it shortly that there was evidence both ways, which should have been left to the jury. The court quashed the conviction.

This does not mean that there is no onus on the prosecution to prove to the satisfaction of the jury that the husband or wife was alive at the date of the second form of marriage. Indeed *R.* v. *Lumley*, L.R. 1 C.C.R. 196, is a direct authority to the contrary. "The existence of the party at an antecedent period" said Lush, J., "in that case, may or may not afford a reasonable inference that he was living at the subsequent date. If, for example it were proved that he was in good health on the day preceding the second marriage, the inference would be strong—almost irresistible—that he was living on the latter day; and the jury would in all probability find that he was so. If on the other hand it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference."

It is worth remarking in conclusion that affirmative proof need not be given that the prisoner knew that his lawful wife was alive. It is sufficient, according to the authority of *R.* v. *Jones*, 21 L.T. 396, that the judge should direct the jury to the effect that they must be satisfied that the prisoner knew his first wife was alive at the time of the second marriage.

THE COAL ACT.

Central Valuation Board.

Lord Reading, K.C., has been appointed Chairman of the Central Valuation Board under the Third Schedule to the Coal Act, 1938. The names of the other members are as follows: As independent persons—Sir Laurence E. Halsey, K.B.E., Mr. Edward Humphrey Noel Ryde, F.S.I.; as persons engaged in the management of mineral estates and having knowledge of coal-mining and experience in the valuation of minerals—Mr. Cecil H. Bailey, F.S.I., Mr. Rollo S. Barrett, F.S.I., Mr. W. Forster Brown, F.S.I., Mr. Stephen R. Ellis, Mr. G. D. Mayhew, Mr. E. Morgan, Mr. David Rankine, F.S.I., Mr. A. R. Thomlinson, F.S.I., and Mr. W. A. Baxter. The above members will constitute the Central Valuation Board for the purpose laid down in sub-s. (1) of s. 6 of the Act of preparing and depositing with the Board of Trade a map showing a division of the whole of Great Britain into valuation regions.

Jurisdiction in Divorce.

Before the commencement of the Matrimonial Causes Act 1937 "nothing short of a full judicial domicil within its jurisdiction could justify an English court in pronouncing a decree of divorce." This rule was followed in *H.* v. *H.* [1928] P. 206, and recently in *Herd* v. *Herd* [1936] P. 205. The decision in *Herd* v. *Herd* in particular disposed definitely of a practice suggested by Sir Gorell Barnes (as he then was) in *Ogden* v. *Ogden* [1908] P. 46, that a deserted wife might be entitled to sue the husband for divorce in the courts of the husband's previous domicil "because otherwise it would be impossible for a wife so situated to obtain a decree as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicil and any domicil with which it were sought to fix him."

Another case of hardship where it was said to be impossible for a wife to get a divorce was reported by Lord Gorell in the report of the Royal Commission on Divorce, 1912, where he said that "the wife of a deported alien would not be able to maintain a suit for divorce at present, for her husband would not have an English domicil."

Under these circumstances there was nothing but a statutory provision which could effect such a sweeping alteration of the fundamental principle that jurisdiction in matters of divorce is based on domicil and that the wife necessarily shares the domicil of the husband.

Such a statutory provision we find now in s. 13 of the Matrimonial Causes Act, 1937.

There is no doubt that the aim of this section is to meet cases of hardship indicated by Lord Gorell, but it seems to be questionable whether that aim was fully realised.

While formerly a change of the husband's English domicil ousted the jurisdiction of the High Court in divorce and certain other matters dealt with in Pt. VIII of the Judicature Act, 1925, such change will now be irrelevant, provided:—

(1) The wife has been deserted by the husband; or

(2) The husband was deported as an alien; and

(3) The husband was immediately before the desertion or separation domiciled in England or Wales.

In other words, if at the time of desertion or deportation there was a domicil in England or Wales, this domicil is being deemed to continue for the purpose of jurisdiction, notwithstanding that the husband has changed his domicil in consequence of or following deportation or desertion. It does not matter whether or not the marriage was celebrated in England or abroad. And it appears to be irrelevant whether or not the husband keeps changing his abode from place to place and thereby seeks to evade his wife, or whether there is a *bonâ fide* change of domicil where he can be sued without difficulties.

It appears to be questionable, however, whether or not the wife has to be resident within jurisdiction at the commencement of the proceedings. On the face of the wording of s. 13 no such qualification is required, but it is submitted that a restricting construction of s. 13 will be necessary. Take the following example: H and W, both foreigners and originally domiciled in Italy where the marriage was celebrated, afterwards become domiciled in England. H is involved in a criminal offence which in no way is connected with his married life and is deported as an alien. W follows him and both H and W go back to their country of origin where they take up permanent residence without any intent to come back to England, even if they should be allowed to do so. H then commits adultery abroad, either in his own country or elsewhere. According to Italian law W cannot obtain a decree of divorce which is unknown to Italian law. W, therefore, prefers a petition for divorce in this country. In this hypothetical case, there can be no doubt that the husband has changed his English domicil after deportation and (quite apart from s. 13) the question whether or not a deported alien automatically loses his English domicil (*c.f.*, *Veith* v. *Veith* (1929), 73 Sol. J. 235) in this case does not arise at all. The problem, therefore, is whether s. 13 gives jurisdiction for the only reason that the husband was deported as an alien and immediately before the deportation was domiciled in England, although none of the parties is or ever was a British subject, the marriage was celebrated abroad and the domicil of the husband clearly can be fixed in Italy. If H and W would have left England voluntarily, e.g., in anticipation of a deportation order or punishment, there could be no doubt that the English courts would not have jurisdiction to dissolve their marriage after the abandonment of the English domicil; in other words: the wife, by the mere fact that her husband was deported, would be in a *better* position as to jurisdiction than otherwise, although her own position in every other respect is exactly the same in both cases.

The fact, however, that the Act deals with desertion and deportation in the same section shows that deportation is regarded as a sort of involuntary desertion, which justifies equal consideration. There can be no desertion, however, if the wife voluntarily follows her husband after deportation and shares his new domicil. Further, the last part of s. 13 ("notwithstanding that the husband has changed his domicil since the deportation or desertion") shows that the section seeks to protect a wife from the legal consequences of certain acts of her husband which prejudices her without her concurrence. In the supposed case, however, the wife voluntarily gives up her residence in England and thereby shares her husband's new domicil not only in law but in fact. It is submitted, therefore, that the true test whether or not there is jurisdiction to dissolve the marriage of a deserted wife or the wife of a deported alien is not only whether or not the husband's domicil immediately before desertion or deportation was in England or Wales, but also, whether or not the wife at the commencement of the proceedings is resident in England in a way which would establish her domicil in this country if she were a *feme sole*.

On the other hand, nothing short of previous domicil in England gives jurisdiction, even if the husband after desertion or deportation keeps changing from place to place, asserting that he had abandoned his original domicil and any domicil with which it is sought to fix him; mere residence in England is not sufficient. Take another example. A British woman gets married to an alien who is an American subject residing but not domiciled in England. By s. 10 (2) of the British Nationality and Status of Aliens Act, 1914 to 1933, she retains her British Nationality, but she acquires her husband's domicil. Shortly after marriage the husband deserts her (or is deported) and keeps changing from place to place; the wife remains in England.

Although in this supposed case the wife is a British subject married to an alien, and always was and still is resident in England, where before her marriage she was even domiciled, the English courts apparently have no jurisdiction to dissolve the marriage tie by divorce. The husband never was domiciled in England. In this respect s. 13 indeed seems to be too limited in its application. The law has (in certain cases) granted to a married woman the possibility to retain her British nationality though being married to an alien. Why not, therefore, take a further step and in a case of a petition by a British woman, originally domiciled and during marriage resident in England, base jurisdiction in divorce on nationality instead of on a foreign domicil she never had real connection with. Here is a field for another law reformer.

The Minister of Health has appointed Mr. C. W. O. Gibson to be Chief Inspector of Audits as from the 1st October in succession to Mr. W. S. Wilkinson, C.B.E., on his retirement from the public service. Mr. H. W. Magrath, M.C., has been appointed Deputy Chief Inspector of Audits as from the same date in succession to Mr. Gibson.

Administration of Justice (Miscellaneous Provisions) Act, 1938.

THIS statute, amending the law with respect to Assizes, Quarter Sessions, Crown Paper, the jurisdiction of county courts and miscellaneous matters, will come into force on 1st January, 1939.

Quarter Sessions.

A court of Quarter Sessions may apply to the Lord Chancellor for the appointment as chairman or deputy chairman, of *an experienced barrister or solicitor* of ten years' standing. The section does not apply to the County of London or Lancaster or to the court of a borough with a separate court of Quarter Sessions (s. 1). *Additional offences* will be triable at a court presided over by a legally qualified chairman (including a recorder's court where the population of the borough is 50,000). The offences include bigamy, endeavour to conceal birth, certain offences under the Perjury Act, 1911, most offences under the Coinage Offences Act, 1936, conspiracies to commit offences punishable summarily; forgery of a document or thing, which is triable on indictment or summarily, except offences under s. 1 of the Official Secrets Act, 1920 (s. 2, 1st Sched.). Sessions will have *power to adjourn generally*, without fixing any date (s. 3). There will be *power to remunerate* a legally qualified chairman who must act as chairman or member of the rating appeal committee, if so appointed, unless his salary has been agreed upon a contrary assumption (s. 4).

Assizes and Committal.

The judge going circuit (or the senior judge, if two judges are together) will have the *sole power to cancel an assize* at a place where there is no business or no substantial business (s. 5, 2nd Sched.; Judicature Act, s. 77 (1) amended). A person charged with an indictable offence triable at sessions *shall not be committed to assizes* unless the case is "unusually grave or difficult," or a case where committal to sessions would cause "serious delay or inconvenience." But the Lord Mayor and Aldermen of the City of London will still have power to commit to the Central Criminal Court. In cases of *burglary* it will no longer be necessary to commit the accused to assizes unless (as s. 38 (2) Larceny Act, 1916, had provided, the sub-section being now repealed) the case were simple and it were expedient to commit him to sessions (s. 6).

Crown Paper.

The *prerogative writs* of mandamus, prohibition and *certiorari* will no longer be issued; the High Court will simply make *an order* requiring the act to be done, or prohibiting or removing the proceedings—to be called an order of mandamus or prohibition or *certiorari*. No return will be made to the order; in prohibition there will be no pleadings; subject to any right of appeal the order will be final (s. 7). An *order of mandamus* may be made requiring a magistrate or judge or county court officer to do an act relating to their office, or requiring a court of summary jurisdiction, or sessions, to state a case (s. 8; 2nd Sched. contains a new s. 5, The Justices Protection Act, 1848, a new s. 5, Summary Jurisdiction Act, 1857, and a new s. 114, County Courts Act, 1934). Informations in the nature of *quo warranto* are abolished; the High Court instead may grant an injunction restraining a person from acting in an office in which he is not entitled to act, and may declare the office vacant (s. 9). New *Rules of Court* prescribing procedure under ss. 7 and 8 will be made, and requiring (as a general rule) leave to proceed and providing that no relief shall be granted and no ground relied on, except with leave, other than the relief and grounds specified when the application was made (s. 10). *No indictment shall be tried in the King's Bench Division*; the High Court, however, may direct an indictment to be tried at bar in that division and an indictment found under s. 1 (4), Administration of Justice (Miscellaneous Provisions) Act, 1933, by a grand jury of the County of London and Middlesex shall also be there tried, unless the High Court orders otherwise. Instead of directing a trial at bar the High Court may direct a trial at the Central Criminal Court before three judges. The trial of any indictment may be removed by the High Court from one court of assize or sessions to another to be specified, if this course appear "expedient in the interests of justice." *Orders in Council* may be made as to the jurisdiction of the court of trial, duties of judicial officers, and for other purposes required by this section (s. 11). *Outlawry proceedings* are abolished; also the exhibiting of articles of the peace in the High Court and criminal informations, other than informations filed *ex officio* by the Attorney-General (s. 12).

Jurisdiction of County Court.

In actions of contract or tort or for money recoverable by statute the jurisdiction of the county court is extended to £200, with an absolute right of the defendant upon notice of objection, within the prescribed time, to have the action transferred to the High Court. Thus, for the figure £100—where it occurs in ss. 40 and 41, County Courts Act, 1934—£200 will be substituted. Two new sections (42 and 44) are substituted for the present sections of that statute (s. 16: 2nd Sched.).

Miscellaneous Amendments.

International conventions by which the high contracting parties or their property are rendered liable to legal proceedings in the courts of the other parties, shall, as soon as they come into force by Order in Council, bring every party within the jurisdiction of the court. The court, in determining its jurisdiction, will give effect to any provision prescribing mode of proof. Orders in Council may certify the parties and the territories; this certificate is conclusive (s. 13).

The High Court will have *wide powers to discharge or vary orders for alimony and maintenance*, whether made before or after the passing of the Act. All the circumstances of the case must be regarded, including any increase or decrease in the means of either of the parties to the marriage (s. 14.).

All appeals from the Mayor's and City of London Court henceforth go to the Court of Appeal (s. 15; see p. 1331, "Annual Practice," 1938).

Equity proceedings may be *transferred from the High Court to the county court* whether an application for a transfer has been made or not (s. 17; 2nd Sched.; new sub-section for s. 54 (1), County Courts Act, 1934).

The *jurisdiction of county court registrars* is extended. County court rules may be made (under a new subsection, viz., s. 99 (3), County Courts Act, 1934), authorising the registrar to hear:—

(*a*) Proceedings other than actions;

(*b*) Actions in which the defendant either does not appear or admits the claim;

(*c*) If the parties apply and the judge gives leave, actions involving amounts under £10 (s. 18).

No less than nineteen enactments—chiefly mediæval—are repealed by the Fourth Schedule.

AUTUMN ASSIZES.

The following days and places have been fixed for holding the Autumn Assizes, 1938:—

NORTH EASTERN CIRCUIT.—Mr. Justice Singleton.—Monday, 17th October, at Newcastle; Monday, 31st October, at Durham; Wednesday, 9th November, at York. Mr. Justice Singleton and Mr. Justice Lewis.—Wednesday, 16th November, at Leeds.

NORTHERN CIRCUIT.—Mr. Justice Tucker, Mr. Justice Asquith.—Thursday, 13th October, at Carlisle; Monday, 17th October, at Lancaster; Monday, 24th October, at Liverpool; Monday, 21st November, at Manchester.

Company Law and Practice.

The Scope and Effect of Arbitration Clauses in Articles.

A REPORT has appeared of the judgments delivered last term by the Court of Appeal (the Master of the Rolls, Scott and Clauson, L.JJ.) in the case of *Beattie* v. *E. & F. Beattie Limited*, 159 L.T. 220, 82 SOL. J. 521. Many interesting points were raised in the action and the judgment of the Master of the Rolls contains many passages which require to be studied with some care by the company lawyer. I think that I had better first set out the facts of the case as clearly and shortly as possible. The plaintiff was a Mrs. Beattie who was suing in a representative capacity as a shareholder in the defendant company—that is to say the action was in the common form by the plaintiff on behalf of herself and other shareholders. The defendant company was joined as defendant for the technical reason that the order asked for was an order on a second defendant for payment to the company of moneys alleged to belong to the company. The second defendant was a certain E.B., a shareholder in the company and a director. The plaintiff was also a director and there was a third shareholder, the son of E.B. In its original form the action had been one primarily concerned with the rights of the plaintiff to inspect the company's books. The plaintiff subsequently to the delivery of the statement of claim applied by summons for leave to amend her writ and statement of claim. The proposed amendments alleged that E.B. had paid to himself and to his son sums of money by way of remuneration which he was not entitled to under the regulations of the company. There was no allegation of bad faith. The payments were merely said to be unjustified and the plaintiff claimed that they should be refunded to the company. On the application for leave to amend, E.B. applied under s. 4 of the Arbitration Act, 1889, to have the new part of the action stayed pursuant to an article in the articles of association of the company. The dispute with which we are here concerned and which the Vice-Chancellor of the County Palatine of Lancaster and the Court of Appeal were successively called on to determine was whether E.B.'s claim to have the matter referred to arbitration was a good one.

E.B. rested his claim on the article to which I have referred. This article was in a form similar to many such articles but perhaps I had better set out the material parts *verbatim*. These were as follows: —

> " Whenever any doubt, difference or dispute shall arise between any members of the company or between the company and any member or members (and for the purposes of this article the word ' member ' shall include any person claiming through or under a member) . . . or on any other account, matter or thing in any way connected with the company; or the conduct, affairs, business or interest thereof, or any act or default of the directors, or any of them, the members of the company respectively shall not take proceedings at law in respect of such doubt, difference or dispute, but the same shall be referred to two arbitrators or their umpire . . ."

This is clearly a wide clause. The sequel will show how E.B. failed to bring his case within it.

It must be remembered that we are only now dealing with the claims involved in the amendments to the writ and statement of claim. These claims were distinct from the relief originally sought by the plaintiff and were treated as in effect a new action for the purposes of s. 4 of the Arbitration Act, 1889. These claims were, moreover, made against E.B. in his capacity of a director of the company and the plaintiff was suing in a representative action to enforce rights of the company to recover from E.B. moneys of the company which had been paid away to him. (I should have said before that the issued shares of the company were held as to half by the plaintiff and as to the other half by E.B. and his son.) The decision of the learned Vice-Chancellor was that the dispute before him did not fall within the article which I have set out above, but that, if he was wrong on that point, E.B. could not rely on that article as constituting a contract between himself and the company and that, therefore, it could not be relied upon as a submission to arbitration between him and the company for the purposes of s. 4 of the Arbitration Act, 1889. E.B. carried the matter to the Court of Appeal

The Master of the Rolls began his judgment by a review of the facts to which I have already sufficiently referred. He pointed out that E.B. was at all material times a director of the defendant company, and that it was against him in his capacity as a director that the claims were made. He then referred to the position of the plaintiff: " The claim which the plaintiff is seeking to enforce in the action . . . is, and must be in a representative action of this character, a claim of the company itself, because a minority shareholder suing in a representative action is suing to enforce rights of the company . . . the action is in reality an action to enforce the rights of the company and of nobody else." It is, I think, essential to the proper understanding of this case to realise that, whatever the form of the action is and whatever the different relations of the parties are, in substance the action was one by a company against one of its directors *quâ* director.

Now the plaintiff's case was, roughly speaking, this: She said that in the arbitration clause in the articles the words " any member or members " must be read as meaning " any member or members in his or their capacity as member or members." The result of so construing the articles would be that the article would not apply to a dispute in which a member is involved, unless the member were disputing in his capacity as a member. Here the member was disputing in his capacity as a director, and the coincidence of his being a member would not be sufficient to bring the dispute within the scope of the article. The defendant's case was that member means member and should not be qualified in any way. No distinction, it was said, should be drawn for the purposes of the article between the capacity of a member as member and his capacity as an individual. Now this is a very fine point—a subtle question, the Master of the Rolls called it—and it remains for the present undecided. In view of the opinion which the Master of the Rolls formed on another part of the case it was unnecessary for him to decide the point and he preferred to leave the question unresolved.

The appeal was dismissed on the grounds that E.B. could not point to any written agreement for submission to arbitration such as is required by s. 4 of the Arbitration Act, 1889. I refer to the words of the Master of the Rolls: " . . . it will be sufficient for him to rely on an agreement appointing him director which is merely to be inferred from conduct, even if in such an agreement a term corresponding to article 133 [the arbitration article set out above] ought to be imported. An agreement so extracted from the general relationship of the parties would not be a sufficient submission within s. 4." E.B. was accordingly driven to setting up the articles themselves as a contract to which he was a party and which would give him the right to have his dispute as a director referred to arbitration. To do this he relied on s. 20 of the Companies Act, 1929, which is the well-known section of that Act, which provides that the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles. But here again E.B. failed. In order for him to succeed it was necessary to argue that the circumstance of his being a director was immaterial so long as he was a member. It was also argued that it was immaterial that the disputing

member who wished to have the matter referred to arbitration was also the member attacked by the company. Section 20 of the Companies Act, 1929, did not, however, avail him anything. "The contractual force given to the articles of association by the section," I quote again the words of the Master of the Rolls, "is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members." Such being the law, the result in the case under consideration was to prevent s. 20 of the Companies Act, 1929, from giving contractual force to the articles as between the company and the directors as such. It followed from this that there was no written submission to arbitration upon which E.B. could rely in a dispute between the company and himself as a director. E.B. was not seeking to enforce a right which was common to himself and other members. The only right common to all the members under the arbitration clause in the articles was the right in certain circumstances to call on the company to refer to arbitration a dispute between itself and the member *quâ* member. E.B., however, was not calling on the company to arbitrate a dispute to which he only accidentally happened to be the other party. He was trying to have his own particular dispute referred to arbitration, and in doing so he was going further than the exercise of the right which he had in common with the other members under the articles.

The case was a difficult one, and it may be that I have not been able to do it full justice in the space which I have devoted to it. The distinctions drawn are sometimes fine ones, and the circumstances and the judgment will require very careful consideration when it becomes necessary to apply them to other cases. I think, however, that the broad ground of the decision is clear enough, and as it is obviously important I cannot do better than end by again stressing it in words of the learned Vice-Chancellor, repeated by the Master of the Rolls: "This article 133, having the effect given to it by s. 20 of the Companies Act, 1929, does not constitute an agreement between the company and the defendant director in his capacity as a director, even though he is a member of the company."

A Conveyancer's Diary.

A MATTER of interest to conveyancers was decided in *Re Russ and Brown's Contract* [1934] 1 Ch. 34.

Contract for Sale of Lease —Underlease only offered.

Property was put up for sale by public auction. The property in Lot 1 described in the particulars of sale as "eight leasehold dwelling-houses" was sold subject to special conditions of sale and the National Conditions of Sale. Some of the houses were stated in the particulars to be held for a term of ninety-nine years, and some for a term of ninety-nine years (less seven days). One of the special conditions was, "the title to Lot 1 shall commence with the leases under which the respective properties are held," and the sixth of the National Conditions of Sale was (1) "Leaseholds:—The abstract of title to leasehold property shall (unless otherwise provided) commence with the lease or underlease creating the term sold." (2) "Inspection of lease:—The lease or underlease or a copy thereof may be examined at the office of the vendors' solicitors . . . and the purchaser shall be deemed to have bought with full knowledge of the contents thereof." (3) "Property held by underlease:—When property sold is held by underlease no objection or requisition shall be made on that account. . ."

The purchaser having objected to the title on the ground that the properties which the vendors contracted to sell as leasehold were in fact held by underlease, the vendors' solicitors replied: "So far as the vendors are aware only Nos. 12, 14 and 20 are held by underlease and this is quite apparent from the particulars of sale which mentions the term as being ninety-nine years less seven days." That reply was written under a misapprehension as in fact all the properties (that is those also which were stated to be held for a term of ninety-nine years) were held by underlease.

A summons was taken out by the vendors for a declaration that the purchaser's objections had been sufficiently answered, and that a good title had been shown under the contract.

The vendors contended that the word "lease" as used in this contract might mean either lease or underlease, and referred to cl. 6 of the National Conditions of Sale, and especially to para. (3), which provided that if the property was held by underlease no objection or requisition should be made on that account, and to para. (7), which gave the purchaser the opportunity of inspecting the leases, and it was said that in this case if the purchaser had inspected the leases he could have found out that they were in fact underleases.

The purchaser of course contended that there was a misdescription, and that nowhere in the contract did it appear that the properties were held on underlease. And further that cl. 6 of the National Conditions of Sale did not assist the vendor.

In *Camberwell and South London Building Society* v. *Holloway* (1879), 13 Ch. D. 754, Sir George Jessel, M.R., observed (p. 762): "Now this case must be distinguished from another class of cases which have been, I think, decided upon sound principles, that where a vendor in his particulars of sale states that which is untrue as a fact he cannot get the assistance of a court of equity for specific performance, because at the same time he said: 'You may go and look at some other document by which you might ascertain that what I have said was untrue.' The purchaser has a right to say: 'I was entitled to rely on your representation and if it is untrue you must take the consequences'; but when the statement itself is not untrue and at the utmost can be said to be ambiguous because it is a lease, although it is also an underlease, and then you are told, 'you may look at the documents and must be bound by the contents,' it appears to me that is quite a different matter."

It is true that in that case Sir George Jessel, M.R., said that in his opinion a contract to assign a lease would be satisfied by assigning an underlease, but he said that the decisions to the contrary were many and he was not in a position to overrule them.

A later case is *Re Beyfus and Brown's Contract* (1888), 39 Ch. D. 110.

In that case the facts were that houses were offered for sale by auction and were stated in the particulars of sale to be held for ninety-nine years from 24th June, 1844, at a ground rent of £21. The fourth condition of sale provided that the title should commence "with the lease under which the vendor holds dated 11th July, 1845." It appeared that in fact the vendor held for a term of ninety-nine years less two days, and the owner of the two days' reversion could not be found.

It was held that there was a fatal misdescription and that the vendor could not rely upon the common form condition that "any error in the description of the property shall not annul the sale nor shall any compensation be allowed in respect thereof."

In the course of his judgment in *Re Russ and Brown's Contract* Clauson, J., quoted with approval the statement in Williams' "Vendor and Purchaser" (3rd ed., p. 339)—"The purchaser is entitled to require an assignment to him of a lease from the freeholder unless the contract distinctly specifies an underlease as the subject of the sale." His lordship continued: "Accordingly I have to consider the question: Did this contract distinctly specify an underlease as the subject of the sale? In my view it did not. It will be observed that my view is consistent with the proposition that on a careful study of everything in the contract it may be that, on the true construction, the contract might be

held to amount to a contract by the purchaser to be content with an underlease; but in my view, unless the contract distinctly specifies that that which is offered for sale is an underlease, it will not be enforced against the purchaser," and later: "In my view if I were to enforce this contract against the purchaser, I should be forcing him to take something different from that which he was led to believe he got under the contract, because, in my view, it was not distinctly specified in the particulars that it was an underlease that was being sold and he was entitled to treat the particulars as offering a lease."

The learned judge accordingly declared that the requisitions and objections to the title to the property comprised in the contract had not been sufficiently answered by the vendors and that no such title to the said property had been shown as the purchaser was bound to accept.

The decision was affirmed by the Court of Appeal.

In a short judgment, Lord Hanworth, M.R., said: "The law as stated by Sir George Jessel, M.R., in *Camberwell and South London Building Society* v. *Holloway* is plain enough; that where the word 'lease' is used it is not satisfied by an underlease, and in the present case we have the word 'lease' used. It is quite true that a provision is made for the National Conditions of Sale to be introduced where they would be appropriate and are not inconsistent with the conditions following; but that is a limited introduction, and I see no means of coming to a conclusion such as Sir George Jessel, M.R., did in the particular case before him that there was an indication that 'lease' included 'underlease'." Lawrence and Romer, L.JJ., concurred.

Landlord and Tenant Notebook.

Tenancy Evidenced by Nature and Value of Property.

It may be useful to examine the question whether inferences as to the existence and nature of a tenancy may ever, and if so when, legitimately be drawn from the nature of the property concerned. The law of landlord and tenant tends more and more to discriminate according to the nature of premises and purposes for which they are let: the Housing Acts, Rent Restrictions Acts, Agricultural Holdings Act, 1923, the Allotments Act, 1922, and L.T.A., 1927, all contain provisions which may modify the rights of landlords and tenants according as the premises can, are, or are meant to be used in particular ways and for particular purposes. And the terms of the tenancies are far from conclusive in most cases, especially when contracting out is excluded. Hence the inquiry.

Authority, apart from cases under such statutes, is scanty and difficult to find, but my first example, culled from the report of *Roe d. Brune* v. *Prideaux* (1808), 10 Ea. 158, illustrates the possible recognition of such a principle as is suggested.

That case concerned the validity of leases granted by a tenant for life, who was held to have exceeded his powers with the consequence that the grant was void. But the jury, returning a special verdict, had found that the tenant in tail had, after the death of the life tenant, received rent at the rate reserved, namely £4 2s. per annum; also, that the rack rent of the premises demised was £60 per annum; also, that no notice to quit had been given. They had not, however, found whether the tenancy was one which required to be terminated by notice, or by what notice, or whether it was terminated. Lord Ellenborough, C.J., agreed that "if no other tenancy appear, the presumption [from the receipt of rent] is that that tenancy was from year to year"; but "if there were a tenancy, it is not for the court to say whether it be continuing or ended." "The court cannot draw the conclusion of fact . . . however palpable it may be what that conclusion ought to be. As to the disproportion between the rent and the value . . . we could not act upon it, because it would only furnish ground to induce a jury to decide against a tenancy . . . Though they would probably receive a very strong direction to decide against a tenancy, yet they only can decide it," and a *venire de novo* was ordered accordingly.

Further support for the suggestion can be found in a case of a very different kind: *Wilson* v. *Abbott* (1824), 3 B. & C. 88, which was an action for rent. The premises concerned were apartments in a dwelling-house, let by the plaintiff to the defendant in March, 1922, at a rent of £45 per annum, payable half-yearly. The defendant paid a half-year's rent at Ladyday, 1823, and on the 23rd June of that year left without notice, but after tendering another quarter's rent. At Michaelmas the plaintiff demanded and was paid a half-year's rent. At Ladyday, 1824, a similar demand was refused, and proceedings instituted. The following passage from the judgment of Abbot, C.J., is in point: "According to the ordinary practice, lodgings are not usually let even for so long a period as a year, and we are now called upon to infer the existence of a contract continuing for two years at least." A nonsuit was upheld.

Smith v. *Widlake* (1877), 3 C.P.D. 10, C.A., was another case of a void lease granted by a life tenant in which disparity between rent and value appears to have played a part. The lease purported to be for sixty years at 6d. per annum, the tenant covenanting to build a house within three years, to use it as a public-house, and to repair it on notice. After the life tenant's death the freeholder accepted rent at the agreed rate; he also mortgaged the property, and ultimately it was sold to the plaintiff. The house was then used as two cottages, and the annual value was £6. It was held that the only effect of the acceptance of rent by the grantor's first successor was to prevent the tenants from being trespassers, as it was received under a mistaken notion as to the validity of the lease. There was, in effect, a tenancy at will. The disparity is not expressly commented upon, but the mere circumstance that it is mentioned and the way in which Bramwell, L.J., introduced the fact into his judgment, "the annual value of the two cottages appears to be about £6, *but* the rent received by J.H. was *only* at the rate of 6d. a year," suggests that it must have played some part in the decision.

But there is, of course, no room for inference when facts are clear without it, and in *Re Stroud* (1849), 8 C.B. 502, a tenant of a brickfield who sought to establish, against a railway company who were exercising their powers of compulsory acquisition, that he held more than a tenancy from year to year failed for this reason. It appeared that he paid annual rents for the surface and for a cottage which was on the property, and a "brick rent" or royalties calculated by reference to the amount of brick earth removed, to be paid annually at Christmas. His agreement also prohibited him from digging more than 8 feet deep. In vain did he tender expert evidence to show that it was contrary to the custom of the trade of brickmaking that land should be hired under a yearly tenancy, and contend that he would be entitled to continue till he had removed all brick earth 8 feet from the surface of the land. Nor did his reference to a rating case, *R.* v. *Westbrook* (1847), 10 Q.B. 178, help him. In that case, in deciding upon annual value, the court had observed upon the initial expense attending the exploitation of brickfields, and it was "understood" that the tenancy should be of some years' duration. In the present case, as Denman, C.J., pointed out, the question was not what was prudent, but what was in the instrument; not what the custom was, but what the agreement was.

I think that the nature of the premises concerned was at least a factor in the decision in *Ladies' Hosiery and Underwear, Ltd.* v. *Parker* [1930] 1 Ch. 304, C.A., which is the most

important authority of recent years on the question of tenancies by holding over. The defendant in that case originally took a three years' lease, 1914–1917, at a weekly rent of £2, of some land at the back of four houses, with a shed upon it. The grantor was an underlessee whose term expired in May, 1923, the head lease running till Michaelmas of that year. Meanwhile, the defendant had continued in possession and paid the same rent; that is to say, he paid it to the underlessee who had granted his term until that underlessee's interest was about to expire in 1913, and from then onwards to a certain bank at the underlessee's request. This bank had in fact acquired the underlease in 1920, and later in the same year the plaintiffs came upon the scene by acquiring a fifty-year lease of one of the four houses, and thus of part of the property occupied by the defendant, subject to the lease expiring in September, 1923. But the defendant never paid rent to the plaintiffs, who, as Maugham, J., put it, seem to have forgotten that it had any right to the premises at the back; the defendant went on paying his £2 a week to the bank. In 1926 the plaintiffs and the bank conducted abortive negotiations to apportion the rent. Matters came to a head when the defendant, having agreed to buy part of the land from the bank, approached the plaintiffs for an underlease of their part. They sued for possession. The defendant claimed to have become a yearly tenant at the expiration, in 1917, of his three years' agreement.

Maugham, J., held that there was no consensus, despite the holding over, between the plaintiffs and defendant, so that there was never any tenancy at all. His lordship gave six separate reasons for this conclusion. That which is of present interest is the first, which sets out the circumstance "that only a comparatively small portion of the premises comprised in the agreement of 10th October, 1914, is the subject of the suggested tenancy, and a tenancy from year to year of the premises at the rear of the house would be one to which the terms of that agreement could hardly apply. The rent . . . has to be apportioned . . . and the tenant would be quite unable 'to deliver up the premises in as good a state and condition' as the same were in 1914, if alterations of premises on other parts of the back land are made either by the tenant or by some third party; in other words, so far as buildings are concerned, the suggested tenancy would be one of a curious slice of a shed, without walls on either side." Earlier on, the learned judge had remarked that the premises were "so constructed that there was no way to the premises at the back at all." The Court of Appeal upheld this finding.

The authorities certainly suggest that in the absence of other evidence the nature of the premises may play an important part in deciding issues in landlord and tenant cases.

Our County Court Letter.

THE RECOVERY OF TOTALISATOR BETS.

In *Tote Investors Limited* v. *Dodd*, recently heard at Liverpool County Court, the claim was for £17 3s. 4d. in respect of money paid on the defendant's behalf and at her request. The plaintiffs' case was that, on the defendant's instructions and promise to pay, they had made certain bets on horse races through the authorised totalisators of the Racecourse Betting Control Board. The stakes were paid by the plaintiffs to the Board before the races. The defendant contended that, as all contracts by way of gaming and wagering were null and void, under the Gaming Acts, she was not liable. His Honour Judge Proctor did not agree with the plaintiffs' contention that the Racecourse Betting Act, 1928 (having placed a statutory obligation upon the Racecourse Betting Control Board to distribute the moneys staked by means of a totalisator among the persons winning bets on that race) had resulted in a repeal of the "null and void" section of the Gaming Act in respect of totalisator betting, and that such betting was now a legal transaction. There were, however, other grounds upon which the plaintiffs' contention that the transactions were not null and void could be more firmly based. The transactions effected by the plaintiffs, on the defendant's behalf, did not fall within the Gaming Act as they were not contracts by way of gaming or contracts by way of wagering. The defendant's promise to repay the lost stakes to the plaintiffs was a valid and binding contract. Judgment was, therefore, given for the plaintiffs with costs, leave to appeal being granted.

TRANSFER OF BANKRUPTCY MOTION TO HIGH COURT.

In a recent case at Ipswich County Court (*In re Capon: The Trustee* v. *Youngman*) the trustee claimed (1) a declaration that the respondent, as landlord, had no right to forfeit the tenancy of a farm of which the bankrupt was tenant at the commencement of his bankruptcy; (2) a declaration that the respondent had not re-entered upon the farm under the powers contained in the tenancy agreement; (3) an injunction to restrain the respondent from re-entering the farm or forfeiting the tenancy; alternatively, as the respondent had asserted a right to distrain and to obtain the trustee's undertaking to pay rent, the respondent was precluded from asserting any right of forfeiture or re-entry. Further alternatively, the trustee claimed (1) relief from the respondent's re-entry on terms to be settled by the court; (2) a declaration that the valuation paid by the next tenant of the farm was charged to the respondent to secure the sum of £636 paid by the respondent to meet the bankrupt's valuation on taking over the farm, and that any balance of the valuation payable by the next tenant be paid to the trustee; (3) a declaration that apart from any money payable to the respondent under any undertaking by the trustee, and from any money expended by the respondent since the receiving order, the respondent was an unsecured creditor for all other debts due from the bankrupt. His Honour Judge Hildesley, K.C., held that he had jurisdiction under the Bankruptcy Act, 1914, s. 105 (1) to hear the motion, but, in the circumstances of the case, he directed the motion to stand over to enable the trustee to bring an action in the High Court within a week, for the purpose of deciding the questions at issue, both parties to have leave to apply.

JOHNES DISEASE IN COWS.

In *Shepherd* v. *Ford and Others*, recently heard at Henley County Court, the claim was for £26 11s., as money paid upon a consideration which had failed. The plaintiff was a dairy farmer and his case was that, in response to an advertisement of the Chiltern Dairy Herd, of Shogmore Farm, Frieth, he wrote ordering two Guernsey cows and calves for £64. Two cows, without calves, arrived, but were unsatisfactory as regards their milk yield. After correspondence, the plaintiff agreed to accept two Jerseys (in exchange) at £48. These arrived on the 7th August, 1937, but only one was satisfactory, as the milk of the other was unfit for human consumption. The unfit cow was suspected to be suffering from garget, but a veterinary surgeon diagnosed Johnes disease. After more correspondence, the plaintiff was offered another Jersey cow and a calf, but one animal he inspected was only worth £15 and the calf was suffering from "scours" with little apparent prospect of recovery. A veterinary surgeon gave evidence that the original cow delivered must have been showing symptoms of Johnes disease for two months. The defence was that the cows were in good condition when dispatched. After their return they were sold for thirty guineas each. A veterinary surgeon stated that he had never attended the defendants' herd for either garget or Johnes disease. His Honour Judge Cotes-Preedy, K.C., held that the plaintiff was under no obligation to accept animals in lieu of any returned. Judgment was given for the plaintiff with costs.

POINTS IN PRACTICE.

Questions from Solicitors who are Registered Annual Subscribers only are answered, and without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the Staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 29-31, Breams Buildings, E.C.4, and contain the name and address of the Subscriber. In matters of urgency answers will be forwarded by post if a stamped addressed envelope is enclosed.

Administration of Estate of Person of Unsound Mind.

Q. 3576. A person of unsound mind died last year possessed of real and personal estate. She had been of unsound mind without lucid interval for the past twenty years and died intestate. In accordance with s. 51 of the Administration of Estates Act, 1925, her real property descends in accordance with the pre-1926 law. The heir at law takes the realty, and the personalty becomes divisible between four great-nephews. The value of the personalty is just about sufficient to pay the costs of winding up the estate and discharging the receiver. Are the costs payable primarily out of the personalty? If not, on what basis is the amount to be borne by the heir at law ascertained? We presume the heir at law is liable for the proportion of the death duties attributable to the realty in any case. Is it necessary for the administrators to assent to the vesting of the realty in the heir at law or is this automatical on death?

A. It has been decided that the exemption in s. 51 (2) of the Administration of Estates Act, 1925, only extended to the devolution of the beneficial interest and the real estate must bear its rateable share of the funeral, testamentary and administration expenses, debts and liabilities under ss. 32, 33, 34 and Sched. 1 (*In re Gates, Gates* v. *Gates* [1930] 1 Ch. 199; and see also "Wolstenholme and Cherry's Conveyancing Statutes," 12th ed., vol. 2, p. 1508). In addition the real estate must bear its own estate duty (Finance Act, 1894, s. 9 (i), and *Re Palmer, Palmer* v. *Rose-Innes* [1900] W.N. 9). The Acts of 1925 did not alter the incidence of estate duty on real estate (L.P.A., 1925, s. 16 (4) and (5); L.R.A., 1925, s. 73 (11); A.E.A., 1925, s. 53 (3), and 1st Sched., Pt. II, para. 8 (*b*); *Re Morris, Skinner* v. *Sanders* [1927] W.N. 146). It would seem, therefore, that the balance of the real estate after payment of its own estate duty would form a mixed fund with the gross personal estate for payment of the expenses, debts, etc. Per "Emmet's Notes on Perusing Titles," 12th ed., vol. 1, p. 467: "The legal estate would in the first instance pass to the personal representative under s. 1 of the Administration of Estates Act, 1925, and to enable the heir to make title, he would have to obtain a written assent from the personal representative under s. 36." The heir at law would also have to bear any succession duty payable in respect of the real estate.

Liability for River Floods.

Q. 3577. After the passing of the Land Drainage Act, 1930, and before the establishment of a catchment board (since established) for the district, the riparian owner on the right bank of a "main" river increased the height of his retaining wall at a bend in the river. In flood times the river is a torrrent, and has been in the habit of overflowing both banks at times of exceptional flood. There has been no flooding since the retaining wall was heightened. The riparian owner on the left bank maintains that his property is now more liable to flood, as much of the water, which formerly overflowed on the right bank, will probably now overflow on the left bank. He has asked the right bank owner to restore the wall to its original height. The wall does not encroach into the river. Is the right bank owner under any liability to the left bank owner if the latter's land is flooded?

A. The facts of the case appear to be governed by *Gerrard* v. *Crowe* [1921] 1 A.C. 395. The right bank owner is therefore under no liability to the left bank owner, if the latter's land is flooded. The retaining wall on the right bank is apparently not an obstruction under the Land Drainage Act, 1930, s. 44, so as to be liable to abatement under sub-s. (3).

Option for New Lease.

Q. 3578. A grants a lease of certain premises to B containing (*inter alia*) (i) the usual covenant by B not to assign; and (ii) an option by B to purchase the freehold of the premises. B assigns to C with the written consent of A. C then enters into a deed of covenant with A on the terms that in consideration of C relinquishing his right to exercise such option to purchase contained in the lease (it apparently being assumed that he has such right, notwithstanding that he is an assignee), A gives to C in lieu thereof the right to an option to take a new lease of the premises for twenty-one years on the usual terms as to notice, etc. Such deed construes references to C to include his permitted assigns. C then assigns the premises to D the parcels of the assignment assigning (*inter alia*) "First all the premises comprised in and demised by the recited lease . . . Fourthly all that benefit of the before recited deed of covenant and the full right to exercise the option therein contained." A's licence to the assignment by C to D permits the assignment by C to D, "for the residue of the term of years granted by the lease" and does not refer to the deed of covenant. Can D exercise the option to take a new lease?

A. The fact that the deed of covenant construes references to C to include his permitted assigns prevents that deed from being merely personal to A and C. The phrase "permitted assigns" means persons to whom the lease is assigned with the consent of A. D can therefore exercise the option to take a new lease.

The Moneylenders Act, 1927, s. 13.

Q. 3579. By s. 13 of the Moneylenders Act, 1927, it is provided that no action shall lie for the recovery of money lent by a moneylender subsequently to the commencement of the Act after one year from the date upon which the cause of action arises. If L, a registered moneylender, makes a loan of, say, £50 to B, to be repaid with interest at the rate of 48 per cent. by instalments of £1 per week, and B falls into arrear, making periodical payments on account, when does time begin to run against L? By proviso (*b*) of s. 13, time does not begin to run until a cause of action has accrued in respect of the last instalment due under the contract. In the case given, further interest is always accruing and it would therefore appear that instalments under the contract are continuing to become due. If this view is correct, the limitation of a moneylender's right of action imposed by s. 13 would appear to have no application to such a contract. Would the position be affected if the contract provided that in default of payment of any instalment the whole amount of principal was to become due?

A. The limitation of time does not apply to a contract such as that set out in the question. The querist's view is therefore correct. The introduction of a default clause, however, would cause the time to begin to run from the date of the first failure to pay an instalment. See *Reeves* v. *Butcher* [1891] 2 Q.B. 509.

To-day and Yesterday.

LEGAL CALENDAR.

12 SEPTEMBER.—Mr. Justice Quain died in London at 32, Cavendish Square, on the 12th September, 1876, after some months of intermittent illness. He had been a judge of the Queen's Bench for little more than four years, and so, though he had enjoyed a high reputation on the Northern Circuit, he had had little time to gain distinction in his new sphere of action. Nevertheless, his learning was much esteemed.

13 SEPTEMBER.—Julius Caesar was sworn in as Master of the Rolls on the 13th September, 1614, after waiting nearly four years for his predecessor to vacate the place, of which he had obtained a reversionary grant from James I. He held that office till his death more than twenty-one years later, not very much regarded for his law, which was notably deficient, but highly thought of for his incorruptibility and his lavish benevolence to the poor and the needy.

14 SEPTEMBER.—John Singleton Copley became Master of the Rolls on the 14th September, 1826. In twenty-two years at the Bar, aided by a pleasing person, countenance and manner, he had come to be recognised as having a good head, a kind heart and no deficiency of learning. Always erect, his eye sparkling and his smile proclaiming his readiness for a jest, he was an attractive figure, popular with all branches of his profession. The Mastership of the Rolls proved only a stepping stone, for eight months later he was seated on the Woolsack, and soon afterwards he became Lord Lyndhurst.

15 SEPTEMBER.—On the 15th September, 1915, the signalman responsible for the Gretna Green troop train catastrophe was sentenced at Edinburgh by the Lord Justice General to three years' penal servitude. The crash was the most terrible which ever occurred in Britain. A train carrying 500 officers and men of the Royal Scots southward had run into a local passenger train, and a Scottish express had run into the wreckage of both, adding fire to the horror of the scene. The death roll mounted to 157, while 200 persons were injured.

16 SEPTEMBER.—Francis Bacon was never backward in seeking promotion, and there is extant an interesting letter from him to Lord Burghley written on the 16th September, 1580, when he was still a youth of twenty, pressing for some special favour in the legal world (it is not quite clear what). He confessed it was most unusual, but urged that "if it be observed how few there be which fall in with the study of the common laws, either being well left or friended, or at their own free election, or forsaking likely success in other studies of more delight and no less preferment, or setting hand thereunto early without waste of years; upon such survey made, it may be my case may not seem ordinary no more than my suit and so more beseeming unto it."

17 SEPTEMBER.—Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer, died at Brighton on the 17th September, 1880, at the age of eighty-three.

18 SEPTEMBER.—On the 18th September, 1867, one of the boldest outrages on British justice was perpetrated at Manchester. A prison van containing two notorious Fenians on remand was being driven from the police court to the city gaol, escorted by eleven police officers. At a point where the road passed some clay pits by a railway arch it was ambushed by about fifty men, who shot the horses, drove off the unarmed guard and battered open the van. Sergeant Brett, riding inside, refused to give up the keys and was shot dead. After the escape of the prisoners had been effected there was a vigorous round-up of suspected persons. The three ringleaders were hanged. They are "The Manchester Martyrs" or "The Boys who Smashed the Van."

THE WEEK'S PERSONALITY.

In his young days Fitzroy Kelly was a powerful and popular advocate, persuasive and ingenious. This ingenuity won him the nickname of "Apple-pip Kelly" when in his defence of a poisoning murder case he suggested that the victim had killed herself by swallowing apple-pips. In his later days, he was a courtly, old-world gentleman with charming manners, a soft voice and a hatred of any loud or sudden noise. He was precise about figures and particularly dates. "Will you be good enough to give me the dates?" was a favourite request of his. "I have already given your lordship the material dates," counsel once rashly replied. "Then be good enough now to give me the immaterial ones," said the Chief Baron. Now and then his attention obviously wandered during a tedious argument, but often though his eyes were closed his mind was open. "Mr. Cole, that is the third time you have said that. Why repeat?" he asked on one such occasion without opening his eyes. "If your lordship pleases, I wanted at least one of them to carry attention." "I heap a coal of fire on your head by informing you that each shot took effect. I can readily shut my eyes to bad law and sophistry."

SWORD AND GOWN.

A newspaper recently published an extract from an issue of a hundred and fifty years ago relating how the barristers of the Parliament of Rennes issued a collective challenge to a number of Royalist army officers, and emulating the celebrated "*Combat des Trente*" between the Bretons and the English, organised a battle between seven of their representative swordsmen and seven of their military enemies. The Commander-in-Chief, however, got wind of the affair and forestalled it by placing all the combatants under arrest. In those days the legal profession, never lacking in physical courage, was particularly pugnacious in all countries. In Ireland it was specially noticeable that an ability to shoot straight was as necessary to a barrister as an eloquent tongue. Lord Chief Justice Norbury while at the Bar was a redoubted duellist, and even in old age was ready to challenge any official who ventured to hint that he was ripe for resignation. Lord Chancellor Clare, Mr. Justice Daly and Mr. Baron Metge could all acquit themselves creditably with pistols.

DUELS AND THE LAW.

The attitude of the Irish Bench is well illustrated by a summing up in a duelling case in 1816: "Gentlemen, it's my business to lay down the law to you and I will. The law says the killing of a man in a duel is murder; therefore, in the discharge of my duty I tell you so. But I tell you at the same time that a fairer duel than this I never heard of in the whole course of my life." In England, the attitude of the law was hardly less tolerant, but it was felt that a certain Governor of Barbadoes, about whom Sir James Marriott, sitting in the Court of Admiralty, had made some severe observations in the course of a case, had gone too far in sending the judge a challenge. The sequel was a criminal information, afterwards withdrawn on apology being offered. Edward Law, the future Lord Chief Justice Ellenborough, once offended a litigant so deeply by his conduct of a case at York Assizes that he was threatened with a challenge. He accordingly postponed his departure for Durham and spent a day walking about booted and spurred in the most prominent place in the city, ready to accept any invitation. None came.

The next General Quarter Sessions of the Peace for the Borough of Walsall will be held at the Guildhall, Walsall, on Thursday, the 6th October, at 10 o'clock in the forenoon.

Notes of Cases.

High Court—Chancery Division.

In re **Dickinson's Settlement; Bickersteth** *v.* **Dickinson.**

Crossman, J. 21st July, 1938.

Settlement—Marriage Settlement made before 1926—Power of Appointment to Children—Appointment to Children who attained Twenty-one—Exercise of Power after 1926—Maintenance—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 31.

In 1885, G.D. made a marriage settlement whereby his wife was given a life interest in certain personal estate with remainder to himself if he survived her during his life. After death of the survivor, the fund was to be held in trust for the children or remoter issue of the marriage, as the husband and wife might by deed direct or appoint, and in default of such appointment as the survivor might by deed or will appoint, and in default of such appointment in trust for all the children of the marriage who being sons should attain twenty-one years, or being daughters should attain that age or marry, in equal shares. There was no express power of maintenance. On the same day the wife made a settlement in similar terms, save that in the husband's settlement there was a power of advancement extending to appointed shares and in the wife's settlement that power was limited to the shares of children of the marriage only. Of the children of the marriage two predeceased the spouses and only one, G.F.D., survived the wife, who died in 1922. G.F.D. died in May, 1932, survived by three children, born respectively in 1916, 1921 and 1929. In July, 1932, G.D., the husband, exercised the power of appointment conferred on him by the respective settlements, directing that subject to his interests in the respective funds they should be held in trust in equal shares for such of his three grandchildren as survived him and attained twenty-five years or were living at the expiration of twenty-one years from his death and for the children, who attained twenty-one years or were living at the expiration of that period, of any of his grand-children who might predecease him or die before attaining a vested interest, such children to take in equal shares the share their parent would have taken if living at his death and attaining a vested interest. The husband, G.D., died in 1934. The question arose whether the Trustee Act, 1925, s. 31, applied to the income of the contingent shares of the grand-children, so that from their attaining twenty-one years the income of their respective shares could be paid to them till their interest vested or failed.

Crossman, J., said that the question arose under s. 31 (5) whereby the section did not apply where the instrument under which the interest arose came into operation before the commencement of the Act. His lordship referred to the Conveyancing Act, 1911, s. 6, and said that in "Farwell on Powers," 3rd ed., pp. 328 and 576, it was said that estates created under powers were to be regarded as created by the instrument under which the powers arose. But at pp. 310–311 it was stated that an appointment created a new estate. This was approved in *Duke of Northumberland* v. *Inland Revenue Commissioners* [1911] 2 K.B. 343, and supported by *In re Rush* [1922] 1 Ch. 302. The latter decision concluded the point. The grand-children's interest arose solely under the appointment in 1932, and s. 31 applied.

Counsel: *Ackroyd; Spens*, K.C., and *Harold Brown*.

Solicitors: *Hill, Dickinson & Co.*, of Liverpool; *Wilson, Cowie & Dillon*, of Liverpool.

[Reported by Francis H. Cowper, Esq., Barrister-at-Law.]

The new president of the Town Planning Institute, Mr. J. E. Acfield, city engineer and surveyor of Leeds, has arranged for the twentieth annual country meeting of the institute to take place in Leeds at the end of this month.

High Court—King's Bench Division.

Hall Bros. Steamship Co. Ltd. *v.* **Young.**

Goddard, J. 1st June, 1938.

Insurance (Marine)—Insurer's Undertaking to Indemnify Shipowners for Sums paid by way of Damages in respect of Collision—Collision with French Pilot Boat—Ship not to Blame—Payment made to Pilot Boat under French Law—Liability of Insurer.

Action for a sum claimed due under a policy of insurance.

A policy of marine insurance, of which the defendant was one of the underwriters, contained a provision that if the ship thereby insured should come into collision with any other ship or vessel and the assured should in consequence become liable to pay and should pay by way of damages to any other person any sum in respect of that collision, the underwriters would pay the assured such proportion of three-fourths of the sum so paid as their respective subscriptions to the policy bore to the value of the ship insured. A steamer, the "Trident," belonging to the plaintiff company and insured by the defendant, *inter alios*, stopped to take up a pilot off Dunkirk, and, as the pilot boat, which belonged to the Pilotage Administration of Dunkirk, was drawing alongside, her steering gear broke down and she came into collision with the steamer, both vessels suffering damage. It was admitted that the "Trident" was in no way to blame, and there was no gross negligence on the part of the pilot boat. By French law, in the absence of gross negligence of the pilot, damage occurring to the pilot boat in the course of pilotage operations and in the course of manoeuvring for the embarkation or the disembarkation of the pilot is for the charge of the ship. After litigation in France, a settlement was reached by which the plaintiffs paid to the owners of the pilot boat the cost of the repairs to that boat. They now claimed to recover under the policy three-quarters of the money which they had paid under the settlement, and sued the defendant for his share of that amount.

Goddard, J., said that it was contended for the plaintiffs that the sum which the shipowners had to pay in respect of the repairs to the pilotage vessel was a sum which was recoverable under that clause inasmuch as the ships did come into collision. On the other hand, it was contended for the underwriter that the insurance was an insurance only against a liability in tort; that the contemplation of the policy was that the underwriter was to indemnify the shipowner where the shipowner was held to blame or partly to blame; that the words "by way of damages" must be strictly construed; and that they showed that the insurance was limited to sums which had to be paid by way of damages, which indicated a liability in tort. His conclusion, on the evidence given by French lawyers, was that there was no conception of delict or tort in the cause of action given by the French law to the pilot boat. If it were a mere matter of having to decide whether the action lay in contract or in tort, he (his lordship) would be inclined to the view that it would be regarded as lying in contract. It was in effect a statutory cause of action given to recover a sum of money in the happening of a certain event. Counsel for the plaintiffs contended that the words "by way of damages" in a business document ought to include such a sum as the one in question and referred to *The Mostyn* [1928] A.C. 57. In *Birmingham and District Land Co.* v. *London & North Western Railway Co.*, 34 Ch. D. 261, Bowen, L.J., at p. 274, laid down the familiar doctrine that "indemnity" in its proper sense was always the result of a contract; but he did say that there might possibly be a case in which indemnity might be given by statute, and "indemnity" for that purpose, presumably, meant a reimbursement by one person to another of something which the latter had had to pay, but without taking into

account any damage which the person might have suffered; he was to be indemnified against payments, but he did not receive anything more than the mere sum which he had to pay. That was exactly the present case. The French pilot boat did not ask for any damages for loss of hire while laid up; she only asked for, and was by the French court held entitled to, the reimbursement of what she would have to spend on necessary repairs. Counsel for the defendant argued formidably that the English underwriters insuring the ship might well agree to indemnify the owners against the negligence and errors of navigation of their own servants, but that there was no reason why the court should hold that the underwriter was indemnifying the owners against damage caused not by the fault of their servants but by the fault of somebody else. The expression, "by way of damages," ought, in his (his lordship's) opinion, to be construed as meaning by way of damages which had to be paid in consequence of a tortious act committed by the ship. In that view he had the support of Branson, J., in *Furness Withy and Company Limited* v. *Duder* [1936] 2 K.B. 461, where he was considering a collision clause in exactly the same terms. Branson, J., had, at p. 464, laid down a good workable rule to apply to the clause, and those liabilities which might be imposed on a ship by foreign law, although the ship was in no way to blame, were not to be held covered by the common form of collision clause, as the one in question was, by which the underwriter agreed to indemnify the shipowner against sums which he should become liable to pay by way of damages. That pointed only to cases in which the ship was held liable for damage which had been caused by her fault. For those reasons, not without some doubt, and it was a point of first instance except so far as covered by the judgment of Branson, J., who was considering a different state of circumstances, he (Goddard, J.) had come to the conclusion that his judgment should be for the defendant.

COUNSEL: *W. L. McNair*, for the plaintiffs; *Cyril Miller*, for the defendant.

SOLICITORS: *Lightfoot, Jones & Co.*, for *Ingledew and Co.*, Newcastle-upon-Tyne; *William A. Crump & Son.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Inland Revenue Commissioners *v.* Personal Representatives of Sir H. Mallaby-Deeley, Bart.

Lawrence, J. 30th June, 1938.

REVENUE—SUR-TAX—VOLUNTARY UNDERTAKING TO MAKE ANNUAL PAYMENTS TO COMPANY—CAPITAL OR INCOME PAYMENTS—RIGHT TO DEDUCT IN COMPUTING TAX—FINANCE ACT, 1922 (12 & 13 Geo. V, c. 17), s. 20 (1) (*b*).

Appeal by case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The deceased was assessed to sur-tax in an estimated amount for the years 1929–30 to 1932–33 inclusive. In 1926 he gave the directors of a company called the Genealogical Publishing Co. Ltd. a written undertaking to provide them with £28,000 in five annual amounts of £5,600. On the 10th March, 1930, when £13,310 of the £28,000 were still unpaid, the deceased entered into a covenant under seal to pay the company seven annual sums decreasing from £5,600 in the first year to £700 in the last. That first sum included the last payment made under the earlier undertaking which was taken as being made under the deed. Deducting that sum, the covenant was accordingly for the payment by specified annual sums of the balance of £13,310 due under the earlier undertaking. The deed contained no reference to the undertaking. It was contended for the deceased, who in his lifetime was the appellant, and subsequently for the present appellants, (1) that the payments under the deed were proper deductions in the computation of his income for purposes of sur-tax; (2) that the deed was a "disposition made for valuable and sufficient consideration," and that the payments under it therefore did not come within s. 20 (1) (*b*) of the Finance Act, 1922; (3) that, even if the deed were not such a disposition, the payments under it were payments of income for a period exceeding six years, and were therefore unaffected by that sub-section. It was contended for the Commissioners (1) that the payments under the deed were capital payments and inadmissible as deductions for purposes of sur-tax; (2) that the deed was not a "disposition made for valuable and sufficient consideration"; and (3) that the words "any income" in s. 20 of the Act of 1922 could only apply to a sum common to the whole seven-year period, namely, £700, the minimum annual payment under the deed of covenant. The Special Commissioners held that the payments under the deed were income payments by virtue of its terms, and were unaffected in their character by the earlier undertaking to which the deed made no reference; that the deed was not a "disposition . . ." within the meaning of s. 20 (1) (*b*) of the Act of 1922; that the opening words of s. 20 (1), "any income," in conjunction with s. 20 (1) (*b*), did not simply denote income payable for any year by virtue of any disposition for a period which could not exceed six years, the words implying, on the contrary, the recurrence in each year of some definable unit of income, only that income which was payable for a period which could exceed six years not being deemed the disponor's income. They accordingly held that, in computing the deceased's liability to sur-tax for the years in question, the deductions allowable in respect of the payments under the deed were restricted each year to the gross amount corresponding, before deduction of income tax, to the net sum of £700. The appellants appealed and the Crown cross-appealed against the decision that the payments were income payments. By s. 20 (1) (*b*) of the Act of 1922, "Any income which by virtue or in consequence of any disposition made . . . by any person after [a specified date] (other than a disposition made for valuable and sufficient consideration) is payable to or applicable for the benefit of any other person for a period which cannot exceed six years shall be deemed . . . to be the income of the" disponor.

LAWRENCE, J., said that, in his opinion, the Special Commissioners were right on all the points. There was nothing to prevent the deceased from altering the form of the undertaking into which he had entered and entering into a covenant which treated the payments to be made as income payments. It was open to the Special Commissioners to find, as they did, that the deed which replaced the undertaking was not made for valuable and sufficient consideration. Finally, it was impossible to read s. 20 (1) (*b*) in the sense for which the appellants contended. It could not be said that the £5,600, for instance, payable in one year was applicable for the benefit of any other person than the disponor for a period of seven years. In fact, it was not. The only sum which could be said to be income within the meaning of s. 20 (1) (*b*) was that which, after deduction of income tax, left a sum of £700. The appeals must be dismissed.

COUNSEL: *Cyril King*, K.C., and *F. N. Bucher*, for the appellants; *The Attorney General* (Sir Donald Somervell, K.C.), and *R. P. Hills*, for the Crown.

SOLICITORS: *F. R. Allen; The Solicitor of Inland Revenue.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Probate, Divorce and Admiralty Division.

Starkey *v.* Starkey.

Hodson, J. 25th July, 1938.

DIVORCE—DESERTION—DEED OF SEPARATION—PRACTICAL INOPERATION OF DEED—DESERTION HELD CONTINUING—MATRIMONIAL CAUSES ACT, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 2.

This was a wife's undefended petition for dissolution on the ground of desertion without cause for three years immediately preceding the presentation of the petition.

HODSON, J., in giving judgment, said that a difficulty had arisen in the present case by reason of the fact that a deed of separation had been entered into between the parties. Having been married in 1914, they lived happily together until July, 1925, when the child of the marriage was born. After the birth of the child the respondent husband began to drink to excess, and to remain away from home for long periods, returning only at irregular intervals—more irregular than those required by the exigencies of business. The situation became very serious by the end of 1931, and the beginning of 1932, when the husband, after an absence from home, returned for a short time. Subsequently he left the home in a violent temper, since when he had not returned. The child remained with the wife. Thereafter the wife made a number of attempts to get her husband to return, she being anxious that the home should be restored, but it never was restored. The wife consulted solicitors, but the husband did not. An agreement was drawn up which provided for payment by the husband to the wife of £2 10s. per week. It was difficult to discover why that agreement was signed. The husband, at any rate, from the start treated it as if it were no agreement at all. In the circumstances, therefore, he, his lordship, thought it was right to say that the desertion which began at the beginning of 1932 had continued, notwithstanding the fact that the separation agreement had been entered into, down to the date of the presentation of the petition. The last attempt by the wife to get the husband to return was made as recently as 1935. The child had been with the wife all the time, and the husband had not seen the child latterly at all. He, his lordship, did not think that it could be said that the deed of separation had operated in any way, or to any material extent, so far as the relations between the husband, the wife and the child were concerned. There would be a decree *nisi*, with costs and custody.

COUNSEL: *H. B. D. Grazebrook*, for the petitioner.

SOLICITORS: *Prebble and Elson*.

[Reported by J. F. COMPTON-MILLER, Esq., Barrister-at-Law.]

Court of Criminal Appeal.

R. *v.* Cohen.

Lord Hewart, C.J., Hawke and Macnaghten, JJ.
28th June, 1938.

CRIMINAL LAW — PROCEDURE — CROSS-EXAMINATION OF PRISONER—QUESTIONS TENDING TO SHOW BAD CHARACTER—CONVICTION—VALIDITY.

Appeal against conviction.

The appellant, one, Cohen, was convicted at the Central Criminal Court of conspiracy and of receiving goods obtained by false pretences. He appealed against his conviction on various grounds, the only material one, that on which leave to appeal was granted, being that part of his cross-examination was contrary to s. 1 (*f*) of the Criminal Evidence Act, 1898, in that he was asked questions relating to his bankruptcy in 1933 and his failure to obtain his discharge from it until 1937, which questions conveyed to the jury that he had been guilty of some misconduct in, or in relation to, the bankruptcy. At the trial the appellant did not put his character in issue. In the course of his cross-examination the appellant was asked about his bankruptcy, the year of his discharge, and the date of his application for it. He was asked whether it occurred to him to keep books after his bankruptcy, and whether his doing so would not make some difference in his prosperity or in his honesty.

LORD HEWART, C.J., delivering the judgment of the court, said that the law on this matter was as clear as it was important and rigorous. If the Act of 1898 was to have utility it was highly important that defendants who went into the witness-box should not be asked questions which had the effect of contravening the Act. By proviso (*f*) to s. 1 "a person charged and called as a witness . . . shall not be asked . . . any question tending to show that he has committed . . . any offence other than that wherewith he is then charged, or is of bad character." Every word of that proviso was important. The Act was infringed not merely if questions were asked showing that a defendant had committed an offence other than that with which he was charged, or was of bad character. It was sufficient if the questions tended to show that. In the opinion of the court the attempt to prove that there had been a cross-examination tending to show that the appellant had been guilty of a bankruptcy offence, had not been successful, but other considerations applied in view of the words: "or is of bad character." The question was what was the true effect of the cross-examination complained of, and not what was in counsel's mind or what the questions were intended to convey. The spirit of the law on the matter was set out clearly in *R.* v. *Ellis* [1910] 2 K.B. 746, at p. 757. Those words referred to the imputation that the prisoner had committed another offence, but the same kind of consideration applied to the provision that the questions should not tend to show that the prisoner was of bad character. The court had repeatedly asked itself in the present case what meaning was reasonably likely to be conveyed to jurors who heard the questions asked. It seemed impossible to give in that context to the words "or in your honesty" a meaning which could escape the mischief of suggesting to the jury that in the matter referred to the appellant had been guilty of dishonesty. The court had reluctantly come to the conclusion that there was only one course open to it. One of the mischiefs of excessive zeal or lack of care in cross-examining prisoners in criminal cases consisted precisely in the fact that the consequence of what was done might lead to the necessary quashing of a conviction which was on other grounds sustainable. It was essential that the protection offered by the Act to a prisoner giving evidence should be closely—not merely loyally, because no question of intention arose—and carefully observed. The appeal must be allowed.

COUNSEL: *J. P. Eddy*, K.C., and *H. Allan*, for the appellant; *John Maude* and *J. C. Phipps*, for the Crown.

SOLICITORS: *E. C. Randall*; *The City Solicitor*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Correspondence.

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL.]

The Tax on Solicitors.

Sir,—Many solicitors are asking why their profession should be the only one which has to make a special contribution to the Revenue, and letters on the subject have appeared not only in the legal but also in the lay press. Is it not the duty of The Law Society to protect the profession and see that it is not the subject of differential and unjust taxation? The solicitors' tax was debated in the House of Commons as far back as 1853, and the Government was actually defeated by fifty-two votes on a motion to abolish the tax on 10th March, 1853. *The Morning Post* of 11th March, 1853, stated: "We are at a loss to conceive why, in these days of unrestricted competition, one particular class of professional men should be exposed to an exclusive and onerous impost," and the other newspapers of the same day commented in similar terms. Competition is far more severe than it was in 1853, for do not chartered accountants, banks, estate agents and others encroach on work which for many centuries has belonged exclusively to solicitors? If there is to be special professional taxation, it should be borne equally by solicitors, barristers, doctors, dentists, chartered accountants, surveyors, and one or two others, otherwise professions should not be taxed. It is interesting to record that when the solicitors' tax was debated

in the Commons in 1853 not a single Government spokesman attempted to justify its existence as a fair and just tax; all that could be said for it was that it brought in a little revenue.

Chancery Lane, W.C.2. G. W. R. THOMSON.
12th September, 1938.

Divorce.

Sir,—I feel that I am expressing the opinion of many other members of the profession when I say that I am at a loss to understand the provisions of the Matrimonial Causes Act, 1937, dealing with cases triable at the Assizes.

The rules clearly lay it down that (1) undefended cases and (2) poor persons cases can be tried locally.

Obviously, and I assume correctly, this rule was enacted to diminish the costs which would otherwise be incurred if such matters had to be tried in the Royal Courts in the Strand. Whilst the rules give jurisdiction to assizes to try undefended cases and presumably for the reason above stated, it is hard to conceive why a petitioner in such cases should have to commence his proceedings in London and then subsequently when the pleadings are closed have the same transferred to the local venue in order to get the benefit of the provisions of the Act before referred to.

In such cases instead of decreasing the cost the opposite is the exact effect. There does not appear to be any valid or logical reason why this state of affairs should be allowed to remain. Surely if undefended cases are allowed to be disposed of at the assizes then the whole of the procedure in such cases should be carried through at the district registries.

18 Bigg Market, SAMUEL MICKLER.
Newcastle-upon-Tyne.
14th September.

Obituary.

SIR PHILIP STREET.

The Hon. Sir Philip Street, Lieutenant-Governor of New South Wales since 1930, died on Sunday, 11th September, at the age of seventy-five. He was educated at Sydney Grammar School and Sydney University, and was called to the New South Wales Bar in 1886. He was raised to the Bench in 1907, became Chief Judge in Equity in 1918, and was Chief Justice of New South Wales from 1925 to 1934.

MR. S. J. F. MACLEOD, K.C.

Mr. Simon John Fraser Macleod, K.C., LL.B., late Senior Commissioner of the Board of Control, died at Kensington on Wednesday, 7th September, at the age of eighty-one. Mr. Macleod was called to the Bar by the Middle Temple in 1881, and went the Western Circuit. He took silk in 1905. He was appointed a Lunacy Commissioner in 1908, and in 1913 he became one of the Legal Commissioners of the Board of Control. He was appointed a Senior Commissioner and legal member of the Board in 1930.

MR. J. E. PIPER.

Mr. John Edwin Piper, I.S.O., LL.B., late assistant solicitor to the Board of Inland Revenue, died on Tuesday, 13th September, at the age of eighty-four. He was educated at King's College and University College, London, and in 1877 he entered the service of the Inland Revenue Department at Somerset House. He was called to the Bar by the Middle Temple in 1887.

MR. W. B. JOHNSON.

Mr. William Burgess Johnson, solicitor, head of the firm of Messrs. W. B. Johnson & Johnson, of Wigan, died on Saturday, 3rd September, at the age of eighty-two. Mr. Johnson served his articles with the firm of Messrs. Ralph Darlington & Sons, of Wigan, and was admitted a solicitor in 1879.

Reviews.

England: Before and After Wesley. By J. WESLEY BREADY, Ph.D. (London). 1938. Demy 8vo. pp. (with Index) 463. Twenty-eight illustrations in gravure. London: Hodder and Stoughton, Ltd. 10s. 6d. net.

This is a book which very much needed to be written, for never before has the history of the Evangelical Movement been the subject of such detailed analysis. The story of how from the single source of Wesley's personal sanctity there flowed far beyond his life and far beyond his times a deep, strong river of religious enthusiasm, broadening as it went to a world-wide significance, calls aloud to be told. Here, indeed, it is told with deep sincerity and passionate enthusiasm. Further, the form chosen gives to the picture painted a well-conceived sense of perspective. It is a pity, therefore, that as a historical work it is somewhat marred by immoderation. The impression which the author gives of a fixed determination to allow nothing good in seventeenth and eighteenth century society betrays a lack of sense of proportion which detracts from one's confidence in his historical judgments. Chapter 4 stands as a good example of how excess of comment and epithet takes away from the force of his condemnation of things worthy to be condemned. Abundance of authorities does not of itself make just history. Even when facts are agreed (and in this book a wealth of facts is harvested) truth depends very much on emphasis. Moreover, the author swims so sturdily in the main stream of the Whig tradition of history that he heeds not at all the corrective influence of such historians as Mr. Arthur Bryant. Those who can apply such correctives for themselves will find in this many-sided work a stimulating and inspiring narrative. One portion, of vital importance at the present time, contrasts in detail the doctrines of Wesley's Christianity with those of Marxian Communism, though the author overstates his case when he says that "Wesley versus Marx is the crux of the modern problem." A greater than Wesley stands against the prophet of materialism and in His army there are many companies.

Books Received.

Income Tax and N.D.C. under the Finance Act, 1938. By T. J. SOPHIAN, of the Inner Temple, Barrister-at-Law. 1938. Demy 8vo. pp. xix and (with Index) 227. London: The Solicitors' Law Stationery Society, Ltd. 15s. net.

The Howard Journal. Vol. V, No. 2. Autumn, 1938. London: The Howard League for Penal Reform. Price 1s.

A Survey of Magisterial Practice in relation to Occasional Licences. By CECIL HEATH, B.A., of the Inner Temple, Barrister-at-Law. 1938. London: The United Kingdom Alliance. Price 2d., post free.

Local Authorities and the Welfare of the Blind, with particular reference to the Blind Persons Acts, 1920 and 1938. By LAWRENCE RICHMOND, O.B.E., Blind Persons Officer, etc., County Council of the West Riding of Yorkshire. 1938. Demy 8vo. pp. xiv and (with Index) 63. London: Law and Local Government Publications, Ltd. Price 5s.

"*Bread.*" The British and Foreign Bible Society's Illustrated Popular Report. 1938. Demy 8vo. pp. 114. London: The British and Foreign Bible Society. Price 6d. (post free, 8d.).

International Survey of Legal Decisions on Labour Law, 1936–37 (Twelfth year). 1938. Royal 8vo. pp. lviii and (with Index) 533. Geneva: International Labour Office. Price 10s.

[All books acknowledged or reviewed can be obtained through The Solicitors' Law Stationery Society, Limited, London, Liverpool, Manchester and Birmingham.]

Legal Notes and News.

Honours and Appointments.

The King has been pleased to confer the honour of Knighthood upon SAJBA SHANKAR RANGNEKAR, Esq., Puisne Judge of the High Court of Judicature at Bombay.

Mr. C. A. R. THOMAS, solicitor, a member of the firm of Messrs. Nantes, Maunsell & Howard, of Bridport, has been appointed Town Clerk of Bridport, in succession to the late Mr. S. Edgar Howard. Mr. Thomas was admitted a solicitor in 1931.

Notes.

"The trend of modern legislation, backed by public opinion, has been to take away from the coroner and his court the question of criminality and place the responsibility in the hands of the police and magistrates," said Mr. R. W. Brighouse, Deputy Coroner for South-West Lancs, at an inquest at Ormskirk last Tuesday.

A resolution endorsing the protests at the unwarranted application of the Official Secrets Acts to journalists and promising unremitting work for an amendment restricting the operation to cases involving the safety of the realm, was passed unanimously at the Institute of Journalists' conference at Keswick on Tuesday.

The Secretary of State for Air has made regulations for carrying out the purposes of the Air Navigation (Licensing of Public Transport) Order, 1938. The regulations came into force yesterday, as did also the main provisions of the Licensing Order, but not the clause prohibiting the flying of an aircraft in contravention of the Order. The date of the coming into force of that provision will be announced later.

A series of talks on "Problems of the Nations" will be held in the Halls of City Livery Companies (by kind invitation) in aid of King Edward's Hospital Fund for London. The talks will be held at 5.30 p.m. on the following dates: 6th October, "China"; 26th October, "Russia"; 10th November, "Eire"; and 24th November, "Czechoslovakia." Tickets may be obtained from the Secretary, King Edward's Hospital Fund for London, 10, Old Jewry, E.C.2.

The Senate of Burma has passed a resolution recommending the Government to urge on His Majesty's Government the desirability of appointing to the Judicial Committee of the Privy Council a person with experience of Burma, of the manners and customs of its people and a knowledge of the Burmese Buddhist law. The Government informed the House that the resolution would be submitted to His Majesty's Government.

South-Western Police Court, Lavender Hill, Battersea, is to be demolished and rebuilt on the same site, says *The Times*. The new building, which will take two years to construct, will have three courts and will deal with the work of Lambeth Police Court, which will be closed. The area covered by the new court will be from Crystal Palace to Richmond Park and from Vauxhall to Norwood. Plans have been prepared and the work of demolishing the old court will begin after Christmas.

The next examinations of the London Association of Certified Accountants will be held on 6th, 7th and 8th December, in Belfast, Birmingham, Bristol, Cardiff, Cork, Dublin, Edinburgh, Glasgow, Hull, Leeds, Liverpool, London, Manchester, Newcastle-on-Tyne, Nottingham, Plymouth and Sheffield. Women are eligible under the Association's regulations to qualify as certified accountants upon the same terms and conditions as are applicable to men. Particulars and forms are obtainable at the offices of the Association, 50, Bedford Square, London, W.C.1.

Wills and Bequests.

Mr. Laurence Charles Webber Incledon, solicitor, of Alcombe, Minehead, left £36,628, with net personalty £26,889.

Mr. Sidney Alfred Mitchell, solicitor, of Stratford, E., left £20,154, with net personalty £19,244.

Mr. Ernest Lonsdale Nanson, solicitor and agent, of Seascale, Cumberland, left £10,972, with net personalty £10,809.

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (30th June, 1932) 2%. Next London Stock Exchange Settlement, Thursday, 22nd September 1938.

	Div. Months.	Middle Price 14 Sept. 1938.	Flat Interest Yield.	‡ Approximate Yield with redemption
ENGLISH GOVERNMENT SECURITIES			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	105	3 16 2	3 12 4
Consols 2½%	JAJO	69	3 12 6	—
War Loan 3½% 1952 or after ...	JD	97	3 12 2	—
Funding 4% Loan 1960-90	MN	106½	3 15 1	3 11 5
Funding 3% Loan 1959-69	AO	94½xd	3 3 6	3 5 8
Funding 2¾% Loan 1952-57	JD	93½	2 18 10	3 4 3
Funding 2½% Loan 1956-61	AO	85½xd	2 18 6	3 8 4
Victory 4% Loan Av. life 21 years ...	MS	104½	3 16 7	3 13 10
Conversion 5% Loan 1944-64 ...	MN	111	4 10 1	2 12 6
Conversion 3½% Loan 1961 or after	AO	96½	3 12 6	—
Conversion 3% Loan 1948-53 ...	MS	98	3 1 3	3 3 8
Conversion 2½% Loan 1944-49 ...	AO	96	2 12 1	2 18 7
Local Loans 3% Stock 1912 or after	JAJO	83	3 12 3	—
Bank Stock	AO	327½	3 13 3	—
Guaranteed 2¾% Stock (Irish Land Act) 1933 or after	JJ	74½	3 13 10	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	85½	3 10 2	—
India 4½% 1950-55	MN	111½	4 0 9	3 6 5
India 3½% 1931 or after	JAJO	84½	4 2 10	—
India 3% 1948 or after	JAJO	73½	4 1 8	—
Sudan 4½% 1939-73 Av. life 27 years	FA	105½	4 5 4	4 3 1
Sudan 4% 1974 Red. in part after 1950	MN	101½	3 16 7	3 10 8
Tanganyika 4% Guaranteed 1951-71	FA	102½	3 18 1	3 14 9
L.P.T.B. 4½% "T.F.A." Stock 1942-72	JJ	105	4 5 9	2 19 1
Lon. Elec. T. F. Corpn. 2½% 1950-55	FA	87½	2 17 2	3 9 9
COLONIAL SECURITIES				
Australia (Commonw'th) 4% 1955-70	JJ	99½	4 0 5	4 0 7
Australia (Commonw'th) 3% 1955-58	AO	85½xd	3 10 2	4 1 6
*Canada 4% 1953-58	MS	106½	3 15 1	3 8 9
Natal 3% 1929-49	JJ	97½	3 1 6	3 5 11
New South Wales 3½% 1930-50 ...	JJ	93½	3 14 10	4 3 11
New Zealand 3% 1945	AO	89½	3 7 0	4 18 10
Nigeria 4% 1963	AO	105½	3 15 10	3 13 3
Queensland 3½% 1950-70	JJ	92½	3 15 8	3 18 6
*South Africa 3½% 1953-73	JD	99½	3 10 4	3 10 6
Victoria 3½% 1929-49	AO	96	3 12 11	3 19 2
CORPORATION STOCKS				
Birmingham 3% 1947 or after ...	JJ	84½	3 11 0	—
Croydon 3% 1940-60	AO	93½	3 4 2	3 8 6
*Essex County 3½% 1952-72 ...	JD	101½	3 9 0	3 7 3
Leeds 3% 1927 or after	JJ	84½	3 11 0	—
Liverpool 3½% Redeemable by agreement with holders or by purchase...	JAJO	98½	3 11 1	—
London County 2½% Consolidated Stock after 1920 at option of Corp.	MJSD	68½	3 13 0	—
London County 3% Consolidated Stock after 1920 at option of Corp.	MJSD	82	3 13 2	—
Manchester 3% 1941 or after ...	FA	83½	3 11 10	—
Metropolitan Consd. 2½% 1920-49 ...	MJSD	95½	2 12 4	2 19 9
Metropolitan Water Board 3% "A" 1963-2003	AO	82½	3 12 9	3 14 4
Do. do. 3% "B" 1934-2003 ...	MS	83½	3 11 10	3 13 4
Do. do. 3% "E" 1953-73 ...	JJ	93½	3 4 2	3 6 4
*Middlesex County Council 4% 1952-72	MN	106½	3 15 1	3 8 2
* Do. do. 4½% 1950-70	MN	111½	4 0 9	3 6 5
Nottingham 3% Irredeemable ...	MN	85½	3 10 2	—
Sheffield Corp. 3½% 1968	JJ	100½	3 9 8	3 9 6
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS				
Gt. Western Rly. 4% Debenture ...	JJ	103½	3 17 4	—
Gt. Western Rly. 4½% Debenture ...	JJ	111½	4 0 9	—
Gt. Western Rly. 5% Debenture ...	JJ	125½	3 19 8	—
Gt. Western Rly. 5% Rent Charge ...	FA	118½	4 4 5	—
Gt. Western Rly. 5% Cons. Guaranteed	MA	106½	4 13 11	—
Gt. Western Rly. 5% Preference ...	MA	88	5 13 8	—
Southern Rly. 4% Debenture ...	JJ	103½	3 17 4	—
Southern Rly. 4% Red. Deb. 1962-67	JJ	106½	3 15 1	3 11 9
Southern Rly. 5% Guaranteed ...	MA	112½	4 8 11	—
Southern Rly. 5% Preference ...	MA	88	5 13 8	—

* Not available to Trustees over par.
‡ In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.